

January 11, 2008

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Western Resource Advocates

Date of Filing: December 6, 2007

Case Number: TFA-0233

This Decision concerns Western Resource Advocates' (WRA) Appeal from a determination that the Department of Energy's (DOE) Western Area Power Administration (WAPA) issued to it on November 7, 2007. In that determination, WAPA partially denied WRA's request for a fee waiver in conjunction with a request WRA submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as DOE implemented in 10 C.F.R. Part 1004. WAPA partially denied WRA's fee waiver request because certain documents WRA requested exist in the public domain. This Appeal, if granted, would require WAPA to either (i) issue a new determination letter describing where in the public domain the requested documents reside and if the documents have "met a threshold level of public dissemination;" or, in the alternative (ii) issue a new determination letter with a fee waiver decision based upon the DOE's regulatory fee waiver factors that WAPA did not address in its initial determination.

I. Background

The Eastern Plains Transmission Project (EPTP) is a construction project for hundreds of miles of power lines over several Great Plains states. The Tri-State Generation and Transmission Association (Tri-State), a WAPA contractor, is one of the EPTP's builders. Memorandum of telephone conversation between Patricia Land, WAPA, and David M. Petrush, OHA, December 20, 2007. WRA filed a FOIA request for numerous records regarding the EPTP. In particular, WRA sought records regarding Tri-State's EPTP "Integrated Resource Plan," WAPA's annual reports to Congress, and correspondence and memoranda on numerous EPTP-related topics. WRA requested a complete fee waiver. Request Letter, dated June 29, 2007.

In correspondence with WAPA, WRA explained that WAPA is a government agency, and the documents pertain to its EPTP-related energy development activities in the West. WRA explained that the public is generally unfamiliar with the EPTP and the WAPA's role in its planning and development. WRA stated that it will disseminate the requested information through its website, newsletter, public forums, and interaction with government and interested

organizations. WRA stated that the information is not publicly available in any agency library or reading room and that as a non-profit organization, disclosure is not in WRA's commercial interest. Letter from WRA to WAPA, dated August 3, 2007.

WAPA partially denied WRA's fee waiver request because "documents and other information [WRA is] requesting already exists in the public domain and therefore[] does not contribute significantly to the public understanding of the operations or activities of the government." WAPA estimated that processing WRA's request would cost approximately \$80,955.66. Determination Letter, dated November 7, 2007 (italics removed). However, without explanation, WAPA offered to absorb 40% of the \$80,955.66 processing costs. Letter from WAPA to WRA, dated August 30, 2007.

WRA filed the present Appeal, challenging WAPA's partial denial of WRA's fee waiver request. Namely, WRA complains that the "determination . . . does not identify which records are in the public domain, nor where they can be found." Also, WRA "appeals WAPA's failure to provide a rationale that makes sense for its estimated \$80,000 cost to provide the requested documents and information." Appeal Letter, dated November 28, 2007.

Subsequent to WRA's Appeal, WAPA explained to OHA that 20-30% of the information WRA requests is available on the WAPA website. A WAPA-conducted Google search showed that the Tri-State website and a host of other websites contain additional information. Memorandum of telephone conversation between Patricia Land, WAPA, and David M. Petrush, OHA, December 20, 2007; E-mail from Patricia Land, WAPA, to David M. Petrush, OHA, December 20, 2007.

II. Analysis

"Intended to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed . . . the Freedom of Information Act requires federal agencies to disclose information upon request. . . ." *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003) (citation and quotations omitted).

The FOIA generally requires document requesters to pay for search and duplication costs. *See* 5 U.S.C. § 552(a)(4)(A)(i). However, each agency has promulgated regulations explaining when a requester is entitled¹ to receive documents at no charge or reduced charge. DOE regulations set forth "two basic requirements, both of which must be satisfied before fees will be waived or reduced." 10 C.F.R. § 1004.9(a)(8); *see also* 5 U.S.C. § 552(a)(4)(A)(iii) (providing authorization for the DOE fee waiver regulations). First, a requester must show that "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government." 10 C.F.R. § 1004.9(a)(8)(i) (internal quotations omitted). This is known as the "public interest" requirement. Second, a requester must show that "disclosure of the information is not primarily in the commercial

¹ The regulations state, "When these requirements are satisfied . . . the waiver or reduction of a FOIA fee *will be* granted." 10 C.F.R. § 1004.9(a)(8) (emphasis added).

interest of the requester.” 10 C.F.R. § 1004.9(a)(8)(ii) (internal quotations omitted). This is known as the “commercial interest” requirement.

The public interest requirement and commercial interest requirement each have non-exclusive factors to show when they are met. A FOIA officer should address the following factors to determine if a requester meets the public interest requirement:

- (A) The subject of the request: Whether the subject of the requested records concerns the operations or activities of the government;
- (B) The informative value of the information to be disclosed: Whether the disclosure is likely to contribute to an understanding of government operations or activities;
- (C) The contribution to an understanding by the general public of the subject likely to result from disclosure; and
- (D) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute significantly to public understanding of government operations or activities.

10 C.F.R. § 1004.9(a)(8)(i)(A)-(D) (internal quotations omitted).

A FOIA officer should address the following factors to determine if a requester meets the commercial interest requirement:

- (A) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure; and if so
- (B) The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

10 C.F.R. § 1004.9(a)(8)(ii)(A)-(B) (internal quotations omitted).

“[F]ee waiver requests must be made with ‘reasonable specificity’ . . . and [be] based on more than ‘conclusory allegations.’” *Rossotti*, 326 F.3d at 1312 (citations omitted). “Congress amended FOIA to ensure that it be liberally construed in favor of waivers for noncommercial requesters.” *Id.* (citation and quotations omitted).

Factor B

OHA has held that, “If the information is already publicly available, release . . . would not contribute to public understanding [i.e., release would not have informative value] and a fee waiver may not be appropriate.” *James Salsman*, 29 DOE ¶ 80,223 (Case No. TFA-0114) (Sept. 7, 2005) (citation omitted).

Courts have adopted a test to show when a fee waiver is inappropriate because the requested documents are already in the public domain. When “material . . . has met a threshold level of public dissemination,” disclosure “will not further ‘public understanding’ within the meaning of the fee waiver provisions.” *Campbell v. Dep’t of Justice*, 164 F.3d 20, 36 (D.C. Cir. 1999) (citation omitted). Lastly, to justify a FOIA fee waiver denial because the documents are in the public domain, the agency must “explain[] where in the ‘public domain’ th[e] materials reside.” *Id.*

In *Campbell*, a requester sought Federal Bureau of Investigation (FBI) records about an activist. *Campbell*, 164 F.3d at 26. The FBI partially denied the requester’s fee waiver because a portion of the requested documents existed in the public domain. *Id.* at 35. However, the FBI never explained to the requester where in the public domain the requested documents resided. *Id.* at 36.

The court held that the FBI must explain where the documents reside in the public domain.² The court reasoned that, “[T]he mere fact that the material resides in the public domain does not justify denying a fee waiver. . . .” “[O]nly material that has met a threshold level of public dissemination will not further ‘public understanding’ within the meaning of the fee waiver provisions.” *Id.* (citation omitted).

Campbell’s analysis assumes that explaining where the documents reside is integral to determining the threshold level of public dissemination at which they further public understanding. Because the FBI did not describe where in the public domain the requested documents resided, the court did not reach the issue of whether the requested documents “met a threshold level of public dissemination.”

In this case, WAPA partially denied WRA’s fee waiver request, stating that, “[D]ocuments and other information [WRA is] requesting already exists in the public domain and therefore[] does not contribute significantly to the public understanding of the operations and activities of the government.”³ Determination Letter, dated November 7, 2007 (italics removed).

² See also *Carney v. Dep’t of Justice*, 19 F.3d 807, 815-16 (2d Cir. 1994) (explaining that “[the agency] merely stated that the records . . . requested had been released . . . without explaining how these records were already available to the public. Accordingly, [the requester’s] requests for fee waivers should not have been rejected for this reason . . .”); *Citizens for Responsibility & Ethics in Washington v. Dep’t of Health & Human Serv.*, 481 F. Supp. 2d 99, 111 (D.D.C. 2006) (citing *Campbell*, *Carney*, and others, and stating, “[T]hese cases suggest that an agency asserting that the requested documents are already publicly available must do more than merely make that assertion”).

³ WAPA partially denied WRA’s fee waiver based on only one of DOE’s four public interest requirement factors. WAPA did not base its partial fee waiver denial on the other three public interest requirement factors or the

Under *Campbell*, this simple statement is an insufficient basis on which to deny WRA's fee waiver request. Just as in *Campbell*, WAPA partially denied WRA a fee waiver, based on the fact that certain of the documents that WRA requested already exist in the public domain. *Campbell* required the WAPA to explain to WRA where the documents in the public domain reside. Indeed, the "public domain" rationale for denying a fee waiver request has no meaning if the requester cannot locate the documents. Stating that the documents exist in the public domain without explaining where they are defeats the FOIA's purpose, which is to provide the requester access to the government's files.

Note, however, that as in *Campbell*, this Decision does not evaluate whether the information that WAPA states is in the public domain reaches a "threshold level of dissemination." That analysis is not yet necessary. The bare fact that WAPA stated that the documents WRA requested are in the public domain (without explaining where) is sufficient grounds to remand the case under *Campbell*.

This Decision is in accord with OHA cases addressing similar issues. In *Gov't Accountability Project*, a DOE office denied a requester a fee waiver without reason and without conducting a search for responsive documents. OHA remanded the case to the office for a determination on the fee waiver issue after it identified and reviewed the documents responsive to the request. *Gov't Accountability Project*, 23 DOE ¶ 80,139 (Case No. LFA-0312) (Aug. 27, 1993); *see also James L. Schwab*, 21 DOE ¶ 80,154 (Case No. LFA-0152) (Oct. 17, 1991) (remanding a fee waiver denial "to the FOI Officer, who should wait until the search for responsive documents is complete and it has been determined what information can be released to Schwab").

Here, similar to *Gov't Accountability Project* and *Schwab*, WAPA can not possibly determine which requested documents (or how many) are in the public domain without conducting a search and reviewing the responsive documents.

III. Conclusion

WAPA partially denied WRA's fee waiver request under "Factor B" because certain of the documents WRA requested exist in the public domain. As the foregoing indicates, WAPA has failed to identify where in the public domain those documents reside, and if they have "met a threshold level of public dissemination," as *Campbell* requires. Accordingly, WRA's Appeal should be granted.

Because we will remand to WAPA to issue WRA a new determination on its fee waiver request, we do not reach WRA's remaining Appeal argument regarding WAPA's fee estimate.

commercial interest factors. Therefore, although no one factor is dispositive, this Decision does not address those other factors.

It Is Therefore Ordered That:

(1) The Appeal that Western Resource Advocates filed on December 6, 2007, OHA Case No. TFA-0233, is granted. Western Resource Advocates' fee waiver request is remanded to the Western Area Power Administration.

(2) The Western Area Power Administration shall issue a new determination. If it wishes to deny WRA's fee waiver request based on "Factor B," then WAPA should determine which documents WRA requests exist in the public domain, if any, and where they are located. WAPA should also decide if those documents have "met a threshold level of public dissemination." It should then issue a new determination based on that information. In the alternative, WAPA may base its new determination on analysis considering the "public interest" and "commercial interest" factors (cited above) that it left unaddressed in its initial determination.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

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